Supreme Court of the United States

OCTOBER TERM, 1969

No. 266

LELIA MAE SANKS NEE JONES, ET AL,
Appellants,

—v.—

GEORGIA, ET AL,
Appellees.

APPEAL FROM THE SUPREME COURT OF GEORGIA

INDEX

Chronological List of Dates of Pleadings, Hearings, Orders, etc.

(1) May 20, 1968—Dispossessory Warrant filed against Lelia Mae Sanks nee Jones.

(2) May 31, 1968—Application for a Rule Nisi filed on behalf of Sanks in the Civil Court of Fulton County (Georgia).

(3) May 31, 1968—Order of the Civil Court of Fulton County setting a date for a show cause hearing as to why Sanks should not be allowed to proceed without posting a bond.

(4) June 5, 1968—Hearing before the Civil Court of Fulton County on the procedural issue of whether Sanks should be allowed to proceed to the merits of her case without complying with the double bond provisions of the Georgia Code.

(5) July 9, 1968—Order of the Civil Court of Fulton County consolidating the cases to date and granting the State's oral motion to intervene.

(6) July 16, 1968—Dispossessory warrant filed against Marie Momman.

(7) July 26, 1968—Application for a Rule Nisi filed on behalf of Momman in the Civil Court of Fulton County.

(8) July 26, 1968—Order of the Civil Court of Fulton County setting a date for a show cause hearing as to why Momman should not be allowed to proceed without posting a bond.

(9) August 8, 1968—Order of the Civil Court of Fulton County consolidating Momman and Sanks, and granting the State's oral motion to intervene to assert the validity of the statutory provisions in question.

(10) October 2, 1968—Order of the Civil Court of Fulton County holding the statutory provisions in question unconstitutional.

Chronological List of Dates of Pleadings, Hearings, Orders, etc.—continued

(11) October 8, 1968—Notice of Appeal to the Supreme Court of Georgia filed by the State of Georgia in the Civil Court of Fulton County.

(12) November 1, 1968—Notice of Appeal to the Supreme Court of Georgia filed in the Civil Court of Fulton County by the Atlanta Housing Authority.

(13) January 23, 1969—Opinion of the Supreme Court of Georgia reversing the Order of the Civil Court of Fulton County.

(14) February 3, 1969—Motion for Rehearing filed.

(15) February 6, 1969—Motion for Rehearing denied by the Supreme Court of Georgia.

(16) February 20, 1969—Notice of Appeal to the Supreme Court of the United States filed by Appellants, Sanks and Momman, in the Supreme Court of Georgia.

(17) April 23, 1969—Jurisdictional Statement filed in the Supreme Court of the United States by Appellants, Sanks and Momman.

(18) May 14, 1969—Motion to Dismiss or Affirm filed in the Supreme Court of the United States by Appellees, The State of Georgia.

(19) June 23, 1969—Probable Jurisdiction noted by the Supreme Court of the United States.

DISPOSSESSORY WARRANT FILED IN THE CIVIL COURT OF FULTON COUNTY AGAINST LELIA MAE SANKS NEE JONES. —filed May 20, 1968

Dispossessory Warrant

CIVIL COURT OF FULTON COUNTY:

GEORGIA, Fulton County.

Personally appeared Clifford Sanks who on oath says that he is, plaintiff herein, and that Leila Mae Jones, defendant herein, is in possession, as tenant of a house and premises situated and known as 2236 Carver Dr., N. W. in said County, the property of said plaintiff, and that said tenant Leila Mae Jones fails to pay the rent now due thereon; and that the said owner desires and has demanded possession of said house and premises, and the same has been refused by the said defendant; and affiant makes this affidavit that a warrant may issue for the removal of the said defendant together with his property from said house and premises.

Sworn to and subscribed before me, this 5/20/68, 19....

CLIFFORD SANKS

W. L. WRIGHT, Deputy Clerk
Civil Court of Fulton County.

GEORGIA, FULTON COUNTY:

To the Marshal of said Court, or His Lawful Deputies, to All and Singular the Sheriffs or Their Lawful Deputies, and All Lawful Constables of said State, Greeting:

Affidavit having been made that the foregoing is in possession as a tenant of the premises described in said affidavit, and that said defendant has forfeited his right to the house and premises therein described, as specified in said affidavit.

You are hereby commanded to remove said defendant together with his property found thereon from said house and premises and to deliver full and quiet possession of same to the plaintiff herein.

Witness the Honorable THOMAS L. CAMP, Chief Judge of said Court.

This 5/20/68, 19....

W. L. WRIGHT, Deputy Clerk.
Civil Court of Fulton County.

GEORGIA, Fulton County.

On ....., 19..., I exhibited the within warrant to defendant, leaving notice of same with ..... in charge, and notice that at the expiration of three days from date I will proceed with the execution of same.

..... Deputy Marshal.

GEORGIA, Fulton County.

On 5-21-68, 19..., I exhibited the within warrant to defendant, tacking written notice on the door of said defendant and Gave T notice that at the expiration of three days from date I will proceed with the execution of same.

A. C. ADAMS, Deputy Marshal.

V $6.00 PAID
No. 63610

CIVIL COURT OF FULTON COUNTY
DISPOSSESSORY WARRANT

CLIFFORD SANKS, PLAINTIFF
2236 Carver Dr. N. W., *Address.*

vs.

LEILA MAE JONES, DEFENDANT.
2236 Carver Dr. N. W., *Address.*

Filed in Office this MAY 20 '68

D. W. AUSTIN, JR., Clerk
Pltffs. Atty.

Pltffs. Phone None
3 Days' Notice Expires 5-31 1968
Tenant Vacated ..... 19.....
Tenant Ejected ..... 19.....
Tenant Settled with Pltff. ..... 19.....
Held up by Pltff. until ..... 19.....
..... D. M.

APPLICATION FOR A RULE NISI FILED ON BEHALF OF SANKS IN THE CIVIL COURT OF FULTON COUNTY.

IN THE CIVIL COURT FOR THE COUNTY OF FULTON, STATE OF GEORGIA

Dispossessory Proceedings
Warrant No. 63610

CLIFFORD SANKS, PLAINTIFF

vs.

LELIA MAE SANKS NEE JONES, DEFENDANT

vs.

H. A. SPRUILL, THIRD PARTY DEFENDANT

APPLICATION FOR RULE NISI

1. Defendant in the above-captioned case shows that she resides at 2236 Carver Drive, N. W., Atlanta, Georgia, and that she was purportedly served with a dispossessory warrant on May 21, 1968, said warrant being number 63610.

2. Defendant denies that the relationship of landlord and tenant exists between the plaintiff and defendant herein, and shows that said warrant is addressed to her in her maiden name and that she is the wife of the plaintiff herein having been ceremoniously married to him on August 16, 1966, in Stewart County, Georgia.

3. Defendant shows that no divorce proceedings have been undertaken by the plaintiff herein nor have the parties separated in any manner.

4. Defendant shows that she and her husband are purchasing their house and make payments therefor to The Bank of Georgia.

5. Defendant shows that by reason of the aforesaid she has substantial defenses to this eviction but that she is without means to post the double-rent bond required by Ga. Code Ann., § 61-303.

6. Defendant shows that said warrant is still outstanding and that it is reasonable, probable and imminent that a Marshal or Marshals of the Civil Court of Fulton County will execute said warrant on Wednesday, May 29, 1968, and dispossess the defendant.

7. Defendant shows that Ga. Code Ann., § 61-303 is unconstitutional on its face and as applied to this defendant insofar as said statute requires the posting of a double-rent bond as a precondition to this defendant's access to the court. By reason of the aforesaid defendant is entitled to proceed without the tendering of said bond.

8. Defendant further shows that Ga. Code Ann. § 61-305 is unconstitutional on its face denying all Georgia tenants equal access to the courts as guaranteed by the Georgia Constitution Article I, paragraphs two, three, and four, and the equal protection clause to the 14th Amendment to the United States Constitution by reason of the fact that all Georgia tenants by exercising their right to be heard must run the risk of losing a double-rent judgment if their defenses prove inadequate.

WHEREFORE, defendant prays:

(a) that this court issue a rule nisi requiring the plaintiff herein, CLIFFORD SANKS, the Chief Marshal of Fulton County, H. A. SPRUILL, and the Attorney General of the State of Georgia to show cause why the defendant should not be allowed to proceed without subjecting herself to the penal rent provisions of Ga. Code Ann., § 61-305, and why the defendant should not be able to proceed without the bond, pursuant to Georgia Code Ann., § 61-303.

ROBERT B. NEWMAN
ROBERT B. NEWMAN
Attorney for Defendant

65 Georgia Avenue, SE
Atlanta, Georgia - 30312
524-7982—524-7983.

[Jurat and Affidavit Omitted in Printing]

ORDER OF THE CIVIL COURT OF FULTON COUNTY STAYING THE EVICTION PENDING A SHOW CAUSE HEARING ON THE ISSUE OF WHY SANKS SHOULD NOT BE ALLOWED TO PROCEED WITHOUT POSTING A BOND.

IN THE CIVIL COURT FOR THE COUNTY OF FULTON, STATE OF GEORGIA

DISPOSSESSORY PROCEEDING
Warrant No. 63610

CLIFFORD SANKS, PLAINTIFF

vs.

LELIA MAE SANKS NEE JONES, DEFENDANT

vs.

H. A. SPRUILL, THIRD PARTY DEFENDANT

ORDER—May 31, 1968

The motion in the above-styled case having been duly presented before me;

IT IS HEREBY ORDERED that the Plaintiff herein CLIFFORD SANKS, and third-party defendant, H. A. SPRUILL, the Chief Marshal of the Civil Court of Fulton County show cause before me on June 6, at 2:00 in open court why the defendant LELIA MAE SANKS nee JONES, should not be able to proceed in forma pauperis without the tendering of the bond as provided for in Ga. Code Ann., § 61-303, (1966 Rev.), and why the defendant LELIA MAE SANKS nee JONES, should not be able to proceed without the operation of the couble-rent recovery statute, Ga. Code Ann., § 61-305, (1966 Rev.), and why the defendant, LELIA MAE SANKS nee Jones, should not be able to remain on the premises until a hearing is had on the substantive issues provided that the defendant pays into the registry of the court the rent as it becomes due from the date of the signing of this order.

IT IS FURTHER ORDERED, that the Marshal of the Civil Court of Fulton County, H. A. SPRUILL, his agents and all others acting in his behalf hold in abeyance all proceedings in this case until the hearing on June 6, at 2:00 is had or until further order of this court.

IT IS HEREBY ORDERED, that the Attorney General of the State of Georgia be served with a copy of this motion and the order attached hereto.

This 31st day of May, 1968.

OSGOOD O. WILLIAMS
Judge, Civil Court of Fulton County.

[Certificate of Service and Acknowledgments Omitted in Printing]

[fol. 6]

IN THE CIVIL COURT OF FULTON COUNTY

TRANSCRIPT OF PROCEEDINGS—June 5, 1968

RELEVANT EXCERPTS FROM TESTIMONY AS TO THE PRACTICAL IMPOSSIBILITY OF OBTAINING THE NECESSARY BOND FOR DISPOSSESSORY PROCEEDINGS MADE A PART OF THE RECORD DURING THE HEARINGS ON APPELLANT'S APPLICATION FOR A RULE NISI BEFORE THE CIVIL COURT OF FULTON COUNTY.

[Title Omitted in Printing]

* * * *

THE COURT: All right, sir.

MR. NEWMAN: Mr. Richard Newfield.

THE COURT: In other words, actually, the record may note that this is solely a constitutional question as related to procedure, and your contentions are that the statute under consideration, which shall be pointed out to the Court, offends both the 5th and 14th Amendments to the U. S. Constitution and the due process clause of the state of Georgia.

MR. NEWMAN: Yes, Your Honor, and the equal protection clause to the state of Georgia, and the right of access laws to the state of Georgia.

RICHARD NEWFIELD,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NEWMAN:

Q What is your name?

A Richard Newfield.

Q Where do you work, Mr. Newfield?

A I work at Korman-Romm Insurance Agency here in Atlanta.

Q How long have you been with this agency?
A I believe seven years this June, this month.
[fol. 7] Q I take it you are in the insurance business?
A Right. I am an independent agent.
Q How long have you been in the insurance business?
A I have been in insurance for ten years.
Q Are you familiar with the bond required of a tenant in order to defend in an eviction case?
A Yes, sir.
Q Are you familiar with the consequences when a tenant, after contesting in an eviction case, loses it sofar as the judgment is concerned?
A I think I am.
Q Are you aware of the fact that if the tenant loses, he has to pay double rent?
A Yes, I am.
Q Now, when—let us assume that one comes to you and requests a dispossessory bond. How long would you require the bond to last?
A I assume—
Q What would be the time?
A That would be determined by the Court. Wouldn't it be determined by the Court?
Q Assume—
A The bond itself would be indefinite until the case [fol. 8] was brought to conclusion.
Q And your coverage would have to comprehend this —the duration of the litigation?
A Right.
Q Mr. Newfield, what sort of collateral, if any, would be required to put up for one of these bonds?
A The various surety companies that we represent would require 100% cash collateral in 99% of the cases, I would say.
Q What do you mean by cash collateral; is that liquid?
A It's a cashier's check or a certified check or cash.
MR. NEWMAN: Okay.
THE COURT: You mean before you would write a bond?

THE WITNESS: Yes, sir.

THE COURT: You would require cash or collateral?

THE WITNESS: The surety company would and equal to the amount of the bond and they mean cash.

Q (By Mr. Newman) What are the particular risks involved in granting a bond of this nature?

A I don't quite follow you.

Q The question is rather redundant. Let me just withdraw it. What is the bond premium on this kind of thing?

A The bond premium would be $20 a thousand.

Q $20 a thousand?

A Subject to a minimum of $10 premium regardless of the amount.

[fol. 9] Q What is the insurance term for a bond of this nature, Mr. Newfield? I don't mean to suggest anything, but is it called a penalty bond or anything like that?

A It's a court bond. I would call it a court bond with a stipulated penalty or an open penalty bond depending on what the court requires. It is what the surety companies would call a financial guarantee and that is the reason for the cash collateral.

Q I see. Well, being familiar with the insurance business and so on, would you say that it was—these bonds are granted with ease or not?

A Not at all. In the first place, as an agent, I would only do it myself for someone that I knew or had confidence in or someone that I wished to do a favor for because it is nigh on to impossible really to place a bond of this sort and, really, as an agent, it is more trouble than it is worth for me. I would lose money just handling it.

Q Okay. That is all the questions I have.

A It would in effect be an accommodation for me and for the surety company.

MR. NEWMAN: Okay. You are right.

CROSS-EXAMINATION

BY THE INTERVENOR:

Q Sir, when you say that you require the posting of [fol. 10] cash, do I understand you to say that you require it in the full amount of the bond?

A Yes, sir.

Q In other words, $1,000 would mean they would have to pay $1,000 cash as collateral?

A Yes, sir.

Q Wouldn't it be fair to say you'd just flat refuse to issue bonds?

A Not in effect.

Q What would be the purpose of—

A My understanding of the purpose of most of the court bonds is the fact that the courts will not handle the cash.

Q I see. What if a person had other realty, would you take that as collateral for writing a bond?

A No, we wouldn't. When I say we, I am talking about the surety company itself.

Q You are talking about your surety company?

A I am an agent and representing several companies.

THE COURT: How many?

THE WITNESS: We have a total of about four surety companies.

INTERVENOR: I have no further questions.

[fol. 11] CROSS-EXAMINATION

BY MR. BATES:

Q Mr. Newfield, how many of these bonds do you write in the course of a year?

A I have never written one.

Q How many years have you been in the field selling insurance?

A Ten years.

Q How do you get such familiarity with these bonds if you have never written one?

A Because I have attempted to write one in the past, and I have from time to time gotten an indication from

companies, and in every case that I have heard about, the people do not have the money to put up the collateral; therefore, the bonds just aren't written.

Q How many bonds has your company written in the last year or so, do you know?

A Of court bonds?

Q Your agency, that's right, particularly on dispossessory warrants, not on garnishments.

A None at all on the—on this type of bond, none. We write quite a few court bonds, probably.

Q In short, your companies have set up certain rules that make it so difficult that none of your applicants can get a bond?

[fol. 12] A In effect, that is what it is.

Q What percentage of the insurance business does your agency have in metropolitan Atlanta, sir?

A I really have no idea.

Q But it would be a very small percentage of the entire—

A It certainly would be a small percentage of the total volume of business.

Q And you are not really representative of the entire insurance agency; you can only say the experience of your particular company and you only mentioned the rules and regulations as are promulgated by your particular companies.

THE COURT: In response to one of your companies, you elicited an answer whereby he had said he had obtained knowledge from other companies.

THE WITNESS: From several of the surety companies that we represent.

Q (By Mr. Bates) These are all companies that are represented by his agency?

THE COURT: By your own agency?

THE WITNESS: That is correct. What was the question?

Q (By Mr. Bates) In short, is the situation this, Mr. Newfield, that you have never written a dispossessory bond, that your company has only written one, is that correct?

[fol. 13] A We have never written one.

Q You have never written one, and that the rules are so prohibitive that your various companies set up and your agency sets up that makes it virtually impossible for a potential client to become an actual client?

A Not exactly. It is not a rule that our agency has set up. It is a rule for requirements that the bonding companies have. We represent more than one company, actually, for surety companies where we place various type bonds and I am very familiar with all kinds of court bonds and this particular bond falls into the category where collateral, 100% cash collateral, is required.

Q This is required by your companies?

A Yes, by the insurance companies or the surety companies, not by the agency. That is the difference I am trying to make. We are agents for various companies.

Q I see. Why do you think it is necessary for these companies to have these rules posting 100% cash bond?

A Well, this is a direct financial guarantee type of bond which says that if the principal under the bond loses the cash, the surety company will make good whatever moneys are stipulated in the bond and, on all direct financial guaranteed bonds, regardless of who it is or [fol. 14] whether it is a company or individual, they require cash collateral unless you are dealing in a major national firm, you know, that is listed on various stock exchanges that would have adequate funds to pay or to pay back the surety company should they have to pay a penalty.

Q On all of these cash bonds, you require 100% collateral?

A No. On the direct financial guarantee for less than national firms, let's say they do.

Q How about something such as a laborer's lien on an individual's house?

A No, not in that case.

Q You would not require cash bond in this case?

A It would depend on the case and the individual.

Q This is a direct exact amount that you are bonding.

A Right. Now, in the first case, in order to obtain a bond, as an agent, I would ask the surety underwriter: would he accept a financial statement? That would be the easiest way for me to handle it and, depending on the type of bond, in most cases, in all cases, a bond of this type they would require cash. They don't care about financial statement or anything else because the surety company knows that if they have to pay a penalty, they have got to pay it and then look to the principal to be [fol. 15] reimbursed and they just won't do it without the cash.

Q If I may put a hypothetical to you, sir: if Rich's, Incorporated owns the store building in which Davison's does business and wish to dispossess Davison's and sought out a dispossessory warrant, would you require a cash bond from Rich's?

A It is a hypothetical case, as you say. Probably for Rich's, no.

Q In other words, you look at the individual when you are setting the conditions under which you will give bond as much as you do the type of bond, look at the individual that is asking for the bond?

A Well, again, it depends on who is suing the case, whether it is an individual or who the defendant is in the case really. I would say to a certain extent, yes. As I say, with a national firm or well-known firm, someone or individual that would have obvious funds to pay any penalty, they might consider taking it without a cash collateral. But I would say just 99%—

THE COURT: Rich's is not an indigent in your judgment, is it?

THE WITNESS: Not hardly.

MR. BATES: That is all the questions I have, Your [fol. 16] Honor.

MR. NEWMAN: Thank you very much.

INTERVENOR: Your Honor, I at this time request the Court take judicial notice of the fact that there is no law in Georgia requiring that the surety on a bond be a bonding company; that it could, assuming it is agreeable to the Court, be an individual owning property as well as the bonding company.

THE COURT: Yes, sir, with this qualification, that the bond must meet the requirements of the statute in relation to amount and ability to meet the obligation.

INTERVENOR: Yes, sir.

* * * *

[fol. 26] THE COURT: No, sir. I think you ought to take the stand, Mr. Newman, for the record.

ROBERT B. NEWMAN,

being first duly sworn, testified in narrative form as follows:

DIRECT EXAMINATION

MR. NEWMAN: My name is Robert Newman and I am an attorney for the Legal Aid Society and on behalf of my clients in this case.

THE COURT: Name the clients now.

MR. NEWMAN: Mrs. Lelia Mae Sanks and Eva Mae White. I attempted to get a bond for this proceeding from three insurance companies: Fireman's Fund, Continental Casualty and Employers' Liability. I was unable to get these bonds.

THE COURT: Any questions?

INTERVENOR: Yes, sir.

CROSS-EXAMINATION

BY THE INTERVENOR:

Q Mr. Newman, did you confine your search to bonding companies?

A I just called these three bonding companies. I didn't contact any individuals, that is, you know, non-insurance people.

Q You didn't contact any friends who might own realty?

A No, I didn't.

[fol. 27] INTERVENOR: I have no further questions.

THE COURT: Do you have any questions?

CROSS-EXAMINATION

BY MR. BATES:

Q The three companies you called again were Fireman's Fund?

A Fireman's Fund, Continental—

Q Which is primarily a property insurance company, is it not?

A Well, I might say that all three of these insurance companies, I am told, do give bonds for this proceeding.

Q But they do not normally do so, this is not a great percentage of their business?

THE COURT: None of them normally do, counsel; that is well recognized. No insurance company—this gentleman pointed out a while ago that these insurance companies are less—generally require collateral unless the tenant should be one as has been brought out here like Rich's; otherwise, you can't get those bonds. That is well recognized.

Q (By Mr. Bates) Did you attempt any of the criminal bonding companies?

A No, I didn't.

Q To see if they would write such a bond?

A No, I didn't.

Dispossessory Warrant Filed in the Civil Court of Fulton County Against Marie Momman—Filed July 16, 1968

Dispossessory Warrant

CIVIL COURT OF FULTON COUNTY:

GEORGIA, Fulton County.

Personally appeared Miss Antha Mulkey who on oath says that he is attorney at law for The Housing Authority of the City of Atlanta, Ga., plaintiff herein, and that Mrs. Marie H. Momman, defendant herein, is in possession, as tenant of a house and premises situated and known as 155 Woodward Ave., S. E., Apt. 717, Atlanta, Ga. in said County, the property of said plaintiff, and that said tenant Mrs. Marie H. Momman fails to pay the rent now due thereon; and that the said owner desires and has demanded possession of said house and premises, and the same has been refused by the said defendant; Delinquent Rental and affiant makes this affidavit that a warrant may issue for the removal of the said defendant together with his property from said house and premises.

Sworn to and subscribed before me, this Jul. 16, 1968, 19....

Antha Mulkey

J. T. Hall, Deputy Clerk
Civil Court of Fulton County.

GEORGIA, FULTON COUNTY:

To the Marshal of said Court, or His Lawful Deputies, to All and Singular the Sheriffs or Their Lawful Deputies, and All Lawful Constables of said State, Greeting:

Affidavit having been made that the foregoing defendant is in possession as a tenant of the premises described in said affidavit, and that said defendant has forfeited his right to the house and premises therein described, as specified in said affidavit.

You are hereby commanded to remove said defendant together with his property found thereon from said house and premises and to deliver full and quiet possession of same to the plaintiff herein.

Witness the Honorable THOMAS L. CAMP, Chief Judge of said Court.

This Jul. 16, 1968, 19....

J. T. HALL, Deputy Clerk.
Civil Court of Fulton County.

Filed in Office July 16, 1968, D. W. Austin, Jr., Clerk

[Affidavit of Service Omitted in Printing]

APPLICATION FOR A RULE NISI FILED ON BEHALF OF MOMMAN IN THE CIVIL COURT OF FULTON COUNTY

IN THE CIVIL COURT FOR THE COUNTY OF FULTON—STATE OF GEORGIA

DISPOSSESSORY PROCEEDINGS
Warrant No. 66636

HOUSING AUTHORITY OF THE CITY OF ATLANTA, and HARRY R. CHANCE, individually and in his capacity as Manager of Capitol Homes, PLAINTIFF

—*vs.*—

MARIE MOMMAN, DEFENDANT

—*vs.*—

H. A. SPRUILL, THIRD-PARTY DEFENDANT

APPLICATION FOR RULE NISI

1. Defendant in the above-captioned case shows that she resides at 155 Woodward Avenue, S. E., Apartment 717, Atlanta, Fulton County, Georgia, and that she was purportedly served with a dispossessory warrant on July 17, 1968, said warrant being No. 66636.

2. Defendant shows that she is a tenant of the Housing Authority of the City of Atlanta, Capitol Home Apartments (hereinafter cited as Atlanta Housing Authority) and that said Atlanta Housing Authority through its agent HARRY R. CHANCE, Manager of Capitol Homes, caused dispossessory warrant No. 66636 to issue on July 17, 1968 from the Marshal's office of the Civil Court of Fulton County, and that said warrant is still outstanding and that it is reasonable, probable and imminent that said warrant will be executed and a Marshal, or Marshals will execute said warrant and dispossess the defendant.

3. Defendant shows that she has been advised by counsel that she has substantial defenses to this eviction, but that she is without means to post the double-rent bond required by Ga. Code Ann. § 61-303 (1966 Rev.).

4. Defendant is informed and believes and based upon such information and belief avers that Mr. Harry Chance caused the dispossessory warrant in question to issue because of a personal quarrel he has had with defendant.

5. Defendant further shows that Ga. Code Ann. § 61-303 (1966 Rev.) is unconstitutional on its face, denying all tenants equal access to the courts as guaranteed by the Georgia Constitution, Article I, paragraphs two, three, and four, and the equal protection clause of the fourteenth amendment to the Constitution of the United States by reason of the fact that all tenants by exercising their right to be heard must run the risk of losing double-rent judgment if their defenses prove inadequate. For the aforesaid reason defendant is entitled to proceed in this action by the payment into the registry of the court of the rent as it becomes due and without subjecting herself to the penal provision of Ga. Code Ann. § 61-305 (1966 Rev.).

WHEREFORE, defendant prays:

(a) That this court issue a rule nisi requiring the plaintiff herein, Atlanta Housing Authority and its agent HARRY R. CHANCE, the Chief Marshal of Fulton County, H. A. SPRUILL, and the Attorney General of the State of Georgia to show cause why the defendant should not be allowed to proceed without subjecting herself to the penal rent provisions of Ga. Code Ann. § 61-305 (1966 Rev.), and why the defendant should not be able to proceed without the bond pursuant to Ga. Code Ann., § 61-303 (1966 Rev.).

JOHN WILLIAM BRENT
JOHN WILLIAM BRENT
Attorney for Defendant

64 Georgia Avenue, S. E.
Atlanta, Georgia 30312
524-2681

[Jurat and Affidavit Omitted in Printing]

ORDER OF THE CIVIL COURT OF FULTON COUNTY STAYING THE EVICTION PENDING A SHOW CAUSE HEARING ON THE ISSUE OF WHY MOMMAN SHOULD NOT BE ALLOWED TO PROCEED WITHOUT POSTING A BOND

IN THE CIVIL COURT FOR THE COUNTY OF FULTON—STATE OF GEORGIA

DISPOSSESSORY PROCEEDING
Warrant No. 66636

HOUSING AUTHORITY OF THE CITY OF ATLANTA, and HARRY R. CHANCE, individually and in his capacity as Manager of Capitol Homes, PLAINTIFF

—*vs.*—

MARIE MOMMAN, DEFENDANT

—*vs.*—

H. A. SPRUILL, THIRD-PARTY DEFENDANT

ORDER—July 26, 1968

The motion in the above-styled case having been duly presented before me;

IT IS HEREBY ORDERED that the plaintiff herein Atlanta Housing Authority & HARRY CHANCE, its agent, and third-party defendant, H. A. SPRUILL, the Chief Marshal of the Civil Court of Fulton County show cause before the Presiding Judge on August 8, 1968, at 10 A.M. in open court why the defendant MARIE MOMMAN, should not be able to proceed in forma pauperis without the tendering of the bond as provided for in Ga. Code Ann., § 61-303, (1966 Rev.), and why the defendant MARIE MOMMAN, should not be able to proceed without the operation of the double-rent recovery statute, Ga. Code Ann., § 61-305, (1966 Rev.), and why the defendant, MARIE MOMMAN, should not be able to remain on the premises until a hearing is had on the substantive issues provided that the defendant pays into

the registry of the court the rent as it becomes due from the date of the signing of this order.

IT IS FURTHER ORDERED, that the Marshal of the Civil Court of Fulton County, H. A. SPRUILL, his agents and all others acting in his behalf hold in abeyance all proceedings in this case until the hearing on August 8, 1968 at 10:00 A.M. is had or until further order of this court.

IT IS HEREBY ORDERED, that the Attorney General of the State of Georgia be served with a copy of this motion and the order attached hereto.

This 26th day of July, 1968.

E. A. WRIGHT
Judge, Civil Court of
Fulton County

Filed in Office July 26, 1968, J. T. Hall, Deputy Clerk

ORDER OF THE CIVIL COURT OF FULTON COUNTY CONSOLIDATING SANKS AND MOMMAN AND GRANTING THE STATE'S ORAL MOTION TO INTERVENE TO ASSERT THE VALIDITY OF THE STATUTORY PROVISIONS IN QUESTION —August 8, 1968

IN THE CIVIL COURT FOR THE COUNTY OF FULTON, STATE OF GEORGIA

DISPOSSESSORY PROCEEDINGS
Warrant No. 66636

HOUSING AUTHORITY OF THE CITY OF ATLANTA, and HARRY R. CHANCE, individually and in his capacity as Manager of Capitol Homes, PLAINTIFF

v.

MARIE MOMMAN, DEF.

v.

H. A. SPRUILL, THIRD-PARTY DEFENDANT

Warrant No. 63610

CLIFFORD SANKS

v.

LEILA MAE SANKS, nee JONES

v.

H. A. SPRUILL

Warrant No. 63443

GIFFORD REALTY CO. and SARA LEAF

v.

EVA MAE WHITE

v.

H. A. SPRUILL

Warrant No. 64053

ALTON KING

v.

JOYCE LEE CLIFTON

v.

H. A. SPRUILL

Warrant No. 64361

TOMAN ROBINSON

v.

JO ANN RUSHER

v.

H. A. SPRUILL

ORDER

It is hereby ORDERED that the case concerning Warrant No. 66636 be consolidated with the remaining above cases.

It is further ordered that the oral motion of the State to intervene in the consolidated cases to assert the validity of the Georgia Statutory enactments in question is granted.

It is further ordered that the defendant in the case concerning Warrant # 66636, MARIE MOMMAN, should be able to remain on the premises until further order of this Court provided that she pay into the registry of the Court the rent as it becomes due from the date of the signing of the Order.

It is further ordered that the Marshal of the Civil Court of Fulton County, H. A. Spruill, his agents and all others acting in his behalf hold in abeyance all proceedings in this case until further order of this Court.

It is further ordered that the Attorney General of the State of Georgia be served with copy of this order.

This 8 day of August, 1968.

KERMIT C. BRADFORD
Judge, Civil Court of
Fulton County

Consented to:

KING & SPALDING

By: G. LEMUEL HEWES
G. LEMUEL HEWES

Atty. for the Housing Authority of the
City of Atlanta, Georgia and Harry R. Chance

JOHN WILLIAM BRENT
JOHN WILLIAM BRENT

Attorney for Marie Momman

ALFRED L. EVANS, JR.
ALFRED L. EVANS, JR.

Assistant Attorney General
State of Georgia

Filed in Office Aug. 8, 1968, W. L. Wright, Deputy Clerk

ORDER OF THE CIVIL COURT OF FULTON COUNTY HOLDING THE STATUTORY PROVISIONS IN QUESTION UNCONSTITUTIONAL—October 2, 1968

IN THE CIVIL COURT OF THE COUNTY OF FULTON, STATE OF GEORGIA

Warrant No. 63610

CLIFFORD SANKS, PLAINTIFF

v.

LEILA MAE SANKS, nee JONES, DEFENDANT

v.

H. A. SPRUILL, THIRD-PARTY DEFENDANT

STATE OF GEORGIA, By the Office of the Attorney General, INTERVENOR

Warrant No. 69418

ULYSSES ROBINSON, PLAINTIFF

v.

LILLIE ALLISON, DEFENDANT

v.

H. A. SPRUILL, THIRD-PARTY DEFENDANT

STATE OF GEORGIA, By the Office of the Attorney General, INTERVENOR

Warrant No. 66636

HOUSING AUTHORITY OF THE CITY OF ATLANTA and HARRY R. CHANCE, PLAINTIFFS

v.

MARIE MOMMAN, DEFENDANT

v.

H. A. SPRUILL, THIRD-PARTY DEFENDANT

STATE OF GEORGIA, By the Office of the Attorney General, INTERVENOR

On previous occasions the controversy presented here has been before this Court. The Court did not, however,

have an opportunity to render a decision upon the constitutional questions raised due to the fact the tenants' eviction caused the proceedings to become moot and thereby precluded a challenge to the constitutionality of the statute.

The precise questions under consideration and issues raised by the pleadings have never been adjudicated by the Supreme Court of Georgia. As a matter of fact our research discloses the precise question has never been adjudicated by either an inferior or appellate court. In the case of *Williams* v. *Shaffer*, et al., 222 Ga. p. 334 (1966) the Court refused to pass upon the issue because the controversy was held to be moot.

This Court, therefore, must be guided by such authorities which may shed light upon the subject matter and particularly must be guided by the interpretation of certain provisions of the Constitution of the United States and the Constitution of the State of Georgia as related to the delicate problem before this Court.

A Transcript of the evidence being a part of the record in this case, the Court does not regard it necessary to make a complete finding of fact, but rather considers it essential to discuss the constitutional questions raised by the pleadings and the authorities applicable thereto.

The tenants (defendants) respectively moved the Court to arrest their dispossession by plaintiffs (landlords) and be permitted to proceed in asserting their respective defenses without posting the bond required of tenants under Georgia Code, Ann. 61303 (Act 1827, Cobb, 902. Acts 1866, p. 25), so that the issues rasied in the respective defenses may be adjudicated by the Court.

The tenants alleged they were without means to obtain or post the double-rent bond required by the statute. The Motions are based upon a contention of each of the defendants that Title 61, Sec. 303 of the Ga. Code Ann. is unconstitutional upon its face and as applied and violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment, United States Constitution and Article 1, paragraphs 2, 3 and 4 of the Constitution of the State of Georgia, Georgia Code Ann. 2-102 (6358), 2-103 (6359, 2-104 (6360 (1945), in that the aforesaid

statute individously bars tenants and particularly indigent tenants, from directly or indirectly challenging the dispossessory proceedings in the courts of the State of Georgia and thereby denies tenants, generally, access to the machinery of the courts.

Heretofore, courts have held that there is no provision in Georgia law which permits dispensing with the bond requirement, even in indigent cases. (See *Powell* v. *Gresham*, 180 Ga. 565) (1935), Code Sec. 61-303 of the Code Ann. as well as Code Sec. 61-305 of the Code Ann. were codified from an Act of the General Assembly of Georgia in 1827 and amended by an Act of 1866. In the case of *P. B. Hall* vs. *Vivian Holmes*, 42 Ga. p. 180, the Court in 1871 in part, held: "Inasmuch as there is no provision made in existing laws of this State, to dispense with the bond and security required of the tenant on account of his poverty a Court of Equity cannot make such an exception."

The Georgia Summary Eviction Statute now permits the landlord to oust a tenant by filing with the court an affidavit that the tenant has held over or has failed to pay rent (Ga. Code Ann. 61-301); and the judge issues a dispossessory warrant ordering the Sheriff or Marshal to evict the tenant and his possessions. (Ga. Code Ann. 61-302). The tenant may arrest the proceeding and prevent his summary eviction under the statute only by filing a counter-affidavit denying the landlord's allegations (Ga. Code Ann. 61-303) and thereby obtain a jury trial on the facts in issue (Ga. Code Ann. 61-304). But in order to remain in possession and obtain a trial (See Ga. Code Ann. 61-304) the statute is mandatory that the tenant must "tender a bond with good security payable to the landlord, for the payment of such sum, with costs, as may be recovered against him on the trial of the case" (Ga. Code Ann. 61-303). If the tenant is not able to furnish the security bond he is summarily evicted. Georgia Code Ann. 61-305 provides: "If the issue specified in Ga. Code Sec. 61-304 shall be determined against the tenant, judgment shall be determined against the tenant, judgment shall go against the tenant for double the rent reserved or stipulated to be paid and further

provides for the payment of future double rent until the tenant surrenders possession of the premises after an appeal or otherwise."

Parenthetically, under Title 61 of the Code of Georgia the defendants now before this Court are "tenants at will." Georgia Law, 361-105, Ga. Code Ann., provides that a landlord may terminate a tenancy at will, for or without any reason, upon two months' notice; the tenant may terminate upon one month's notice. The uncontradicted evidence in the cases under consideration shows that the landlord did not give the tenants the notice specified under Sec. 61-105 and apparently did not desire to terminate the tenancy under that section. On the contrary, the landlord has proceeded under Sec. 61-301, in which it is alleged that the tenants are holding the premises over and beyond the term for which the same was rented to each of the said respective tenants and that the tenants are in arrearage of the rent as agreed upon between the tenant and the landlord. Having proceeded under this section and the warrant being sued out, as aforesaid, only four days' notice to the tenant is required by Code Sec. 61-306 of the Code, as amended, by the 1968 Session of the General Assembly of Georgia (Ga. L. 1968, pp. 124-126); six days' notice is required within Fulton County (Fa. L. 1968, pp. 1215-1216). Prior to the 1968 amendments merely three days' notice was required. After the expiration of the time specified in the notice, the statute provides that "said officer shall proceed with the execution of said warrant."

In Huckaby vs. Brooks, 75 Ga., p. 678 (1885), the Court held: "The law in respect to the right of landlords to distrain for rent is very straingent, and the execution of the writ, or order of the magistrate to seize and sell to collect rent, can be arrested by counter-affidavit only in one way. The tenant must swear that he does not owe the rent, or some part, because not due, and give bond and security for the eventual condemnation money." In support of this decision the Court cites the case of *Hall* vs. *Holmes*, 42 Ga. 186 (1871); *McCullough* vs. *Good*, 63 Ga. 519 (1879); as well as *Toomer* vs. *Mann*, 63 Ga. 735 (1879). Subsequent decisions of

the Supreme Court of Georgia follow the principles as pronounced in the decisions, supra; suits in Equity to enjoin dispossessory proceedings have been to the same effect. (See *Gilmore* vs. *Wells*, 78 Ga., 197 (1886); *Smith* vs. *Wynn*, 111 Ga. 884 (1900); *Pope* vs. *Thompson*, 157 Ga. 891 (1924); *Brown* vs. *Watson*, 115 Ga. 592 (1902); *Napier* vs. *Varner*, 149 Ga. 586 (1919). The latest decision dealing with the question of suits in equity to enjoin dispossessory proceedings is is in the case of *Powell* vs. *Gresham*, 180 Ga. 565 (1935); and there the Court held "A warrant to dispossess will not be emjoined by a court of equity; the remedy of the tenant, if he has any defense, being to file the counter-affidavit provided for by the statute; and this is so though the tenant, on account of poverty, may be unable to give the bond and security required as a condition precedent to the filing of such counter-affidavit." The Powell case, therefore, approved the cases supra. on the question of the tenant pursuing any action to enjoin the landlord from proceeding.

As heretofore pointed out in those cases constitutional questions were not appropriately raised by the tenants. Undoubtedly, it was the intent of the Legislature to protect the landlord against ill-founded or frivolous claims of the tenant. The protection devised was that as a condition precedent to resist in the dispossessory proceeding the tenant not only in required to post bond but he and his bondsman are also obligated and required to pay double-rent in the event his defense is adjudicated to be without merit.

In relation to conditions precedent, the courts have held as long as the basis of distinction is real and the condition imposed has a reasonable relation to a legitimate object, the State may without violating the Equal Protection Guaranty prescribe a reasonable and appropriate condition precedent to the bringing of an action of a specified kind or class which includes requiring the execution of a bond under certain circumstances. A qualification or an exception to that principal, is that a citizen cannot be deprived of a remedial right indirectly by imposing conditions which are so harsh and oppressive as

to prevent him from executing the right. See *Jones* vs. *Union Guano Co.* 264 U. S. 171 (1923); also *Scarborough* vs. *Newsome*, 7 So. 2d p. 321.

Historically, the courts have many times disagreed as to what constitutes Equal Protection of the laws and, likewise what constituted the denial of Due Process. Basically the Equal Protection of the laws of a State is extended to persons within its jurisdiction, within the meaning of the Constitutional requirement, when its courts are open to all with like rules and modes of procedure, for the security of their persons and property and the prevention and redress of wrongs. Equal Protection of the Law means that Equal Protection and security are given to all and this specifically includes the exemption from any greater burden or burdens that are imposed upon all others under like circumstances.

Relevant Georgia Constitutional Provisions

2-102—Protection the Duty of Government

Protection to person and property is the paramount duty of government and shall be impartial and complete.

2-103—Life, Liberty and Property

No person shall be deprived of life, liberty or property except by due process of law.

2-104—Right to the Courts

No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both.

U. S. Constitution, Fourteenth Amendment

. . . Nor shall any State deprive any person of life, liberty, or property without due process of law; nor to deny any person with its jurisdiction the Equal Protection of the law.

In dealing with Title 61 of the Code Ann., this Court is concerned directly with two Code sections, 61-303 and 61-305 of the Georgia Code Ann. Though reference has been made to other sections of Title 61, in doing so we consider these sections only as related to 303 and 305

respectively. The sole question, therefore, is whether or not the bond and double rent requirements of Georgia Law violate the Due Process and Equal Protection clauses of the Constitutions of the United States and the State of Georgia, thus denying tenants the right of access to the court.

It is elementary and a well established principle of constitutional law that all litigants must have Equal Access to the courts in the enforcement of and defense of legal rights and our own State Constitution expressly guarantees every person "the right to prosecute or defend his own cause in any of the courts of this State." See *Davidson* vs. *Jennings*, 27 Colo. 187, 190.

Whereas, the Due Process clause of the State Constitution as well as the Fourteenth Amendment of the United States Constitution is sufficient to guarantee to all persons access to the courts, it is of significance that the Constitution of the State of Georgia unequivocally by its wording is specific in guaranteeing that all persons shall have access to the courts to prosecute or defend their causes.

The defendants' contention of invidious and unconstitutional discrimination is supported by a number of authorities and the Georgia courts have long rejected any procedures that treat equal litigants unequally. In the *First National Bank* vs. *State Highway Department*, 219 Ga. 144 (1963), the Court held unconstitutional the statute under which a condemnee was required to pay interest on any money award by the special master in the event a jury subsequently reduced the condemnation award. In holding the statute unconstitutional the Court pointed out that under the Statute the condemness unlike all other litigants in the State would be obligated to pay interest on money due the State before a jury had made a final determination of the actual amount due. In this case as in others the Court held that the provision treating various litigants differently violates the State Constitutional requirement that "Protection to person and property shall be impartial and complete." See *Valdosta* vs. *House*, 156 Ga. 496 (1923); *City of Newnan* vs. *Atlanta Laundries, Inc.*, 174 Ga. 99 (1931); *American Bakeries Co.* vs. *City of Griffin*, 174 Ga. 115 (1931).

The Court is not unmindful of Statutes classified as "Bad Faith" Statutes as applied to tort actions as well as contract actions. Under the Bad Faith Statutes, however, the question of whether or not Bad Faith in fact exists is based upon a determination of whether or not a justiciable issue exists between the parties and if in fact a justiciable issue does exist the penalty sections cannot be applied.

Under Code Section 61-305 if the issue is decided against the tenant judgment goes against him for "double the rent" and this is true even though the tenant may have a justiciable issue, but does not prevail in the litigation.

The Supreme Court of Georgia has considered Code Section 2-103 of the Ga. Code Ann., being part 4, Section 1 of the Constitution, to mean that a party who seeks judicial relief cannot be penalized if he loses his case. The Court in refusing to award damages to the defendant said a litigant may not "be penalized by the award of damages whenever he loses his case. Otherwise, every man would enter the doors of the Courthouse, no matter how honestly or with what probable cause, with a danger of damages hanging over him." *Fender* vs. *Ramsey*, 131 Ga. 449 (1908).

Thus the Court upheld the individual litigant's right to uninhibited access to the courts as guaranteed by the Constitution of Georgia. This rationale was upheld in *King* vs. *Pate*, 215 Ga. 593 (1960), where *Fender* vs. *Ramsey* was cited with approval, as well as in *Builders Supply Co.* vs. *Pilgram*, 115 Ga. 85 (1902).

Citing Fender vs. Ramsey with approval in *Davidson* vs. *Jennings* supra, the Supreme Court of Colorado in discussing the constitutionality of a statute stated: "Justice cannot be sold or denied by the exaction of a pecuniary consideration for its enjoyment by one when it is given freely and open handed to another, without money and without price, nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right, the right to be treated equal in the enforcement and defense of legal rights by the imposition of arbitary, unjust, odious discriminations perpetrated un-

der color of establishing peculiar rules for a particular occupation."

In giving consideration to the constitutionality of Code Section 61-303, as well as 61-305, the Court cannot ignore the time element as provided by Code Section 61-306 in which the defendant tenant is required to post the bond as prescribed in Code Sec. 61-303, nor can the Court overlook the statute specifying the time element a tenant has in which to arrest the proceeding by the filing of counter-affidavit in the event he is able to obtain a bond, the bond being a necessary prerequisite in order to retain possession of the premises. In *Holland Furnace Company* vs. *Willis*, 222 Ga., p. 156 (1966), the Court held, "the primary essentials of Due Process of law are notice and an opportunity to be heard; and, essential to an opportunity to be heard is the right to a reasonable time, after notice, for preparation of a defense to a proceeding or suit."

The statutory provisions involved are no less repugnant to the Federal Constitution than they are to the Georgia Constitution.

In giving considerations to the attack upon the statutes herein involved the Court cannot brush aside *Griffin* vs. *Illinois*, 351 U. S. 12 even though Griffin vs. Illinois involved a criminal defendant. It is obvious the Court's opinion did not limit the principle to criminal defendants and in fact the Court in its decision cited with approval *Hovey* vs. *Elliott*, 167 U. S. 409 (1897), using the following language: "No one would contend that either a state or the federal government could constitutionally provide that defendants unable to pay court cost in advance should be denied the right to plead not guilty or to defend themselves in court (citing *Hovey* vs. *Elliott* supra). Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor."

As noted in *Griffin* vs. *Illinois*, the 14th Amendment guarantees certain fundamental rights to an indigent defendant in State criminal proceedings. *Griffin* vs. *Illinois* makes it possible for the defendant to prosecute an appeal with a transcript of the evidence even though the

defendant is unable to pay for same. Subsequently, the Supreme Court held that despite a criminal defendant's inability to pay, the right of counsel was nonetheless inviolate. *Gideon* vs. *Wainwright*, 372 U.S. 335 (1963). Anything less to support such fundamental rights for every citizen, regardless of his station in life, would amount to a denial of due process and equal protection of the laws.

The crux of the case now before this tribunal questions the validity of a statute that denies an indigent defendant a hearing in a dispossessory proceeding, solely on account of his poverty. The denial of the hearing stems directly from the defendant's impoverished circumstances which make it impossible for him to provide the required statutory bond.

In *Hovey* vs. *Elliott*, 167 U. S. 409, the Supreme Court of the District of Columbia deprived a defendant of his right to answer a suit brought against him. Having stricken the defendant's answer, the Court entered judgment against him as a punishment for his refusal to deliver to the Court-appointed receiver certain funds which were the subject matter of the litigation. When the State of New York later refused to honor that judgment, the Supreme Court of the United States held: "that the District Court of Columbia had deprived defendant of his property without Due Process of Law by denying him his constitutional right to a day in court."

The Supreme Court, at 167 U. S. 409, 413, went on to say that a hearing, an opportunity to be heard, is fundamentally in effect, part and parcel of due process: "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right tp defend an action and to enter decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such authority into an instrument of wrong and oppression . . . .

" 'A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.' "

In *Hovey* vs. *Elliott the Supreme Court* reaffirmed the common law that "no man was condemned without being afforded opportunity to be heard" in constitutional terms. And, explained the Court, this principle is simply the rule of natural reason, expressed by Seneca 2000 years ago: Qui statuit aliquid, parte inaudita altera, Aequum licet statuerit, haud aequus fuit—He who determines any matter without hearing both sides, though he may have decided right, has not done justice.

Constitutional guarantees of due process and equal protection apply to other than criminal cases. In finding the Virginia poll tax unconstitutional, Justice Douglas, for the Court, stated in *Harper* vs. *Virginia Board of Election Comm.*, 383 U. S. 663, 668-670 (1966): "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored . . . .

" 'We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined . . . .

" 'Those principles apply here. For to repeat, wealth or fee-paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.' "

Certainly the right to a hearing is no less precious and sacrosanct. This Court is now being asked to stamp its judicial imprimatur upon the dispossession of the defendants—all without granting a hearing to the defendants. It is to be noted that a suit by private individuals to oust other private individuals from the occupancy of their property constitutes state action under the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). Therefore, a State court may not enforce private "self help" techniques authorized by the common or statutory law for dispossession unless the Court's action complies with the requirements of the Fourteenth Amendment.

The real question at issue is whether the defendants are to be granted a hearing before their dispossession. It is the same question asked by St. John, 7:51, "Doth our law judge any man, before it hear him and know what he doeth?" This Court has no choice but to answer with a pious no. The requirement that an indigent post a bond before he is granted a hearing is an impossibility. The uncontradicted evidence in these proceedings show that the defendants are indigent and unable to obtain bonds; this situation takes on increasing importance when considered in the light of the evidence that during the year 1967 more than 19,000 dispossessory warrants were issued in Fulton County and the fact that defenses were actually interposed in merely 13 instances.

The constitutional guarantee of equal protection of the laws is not subject to a construction which allows a man of means to defend his rights in court while denying the same opportunity to the indigent. The availability of the courts is necessarily open to all—both rich and poor alike. Equal protection of the laws does not permit as a condition precedent for access to the machinery of the courts a bond which a defendant is without means to procure.

The Statute which requires a bond before appearing in court is an unconstitutional and unconscionable deprivation of the fundamental right to be heard where the defendant is unable to post such a bond.

Accordingly it is the order of this Court that the respective defendants have the right to file any and all defenses they may have in connection with this matter without first posting bonds; it is further ordered that pending a final determination of this litigation or until further order of the Court, the respective defendants are to pay monthly without penalty into the registry of the Court, the sums stipulated between the parties as rent.

It is further ordered that the defendants (tenants) may proceed to assert their defenses without being subjected to the penalty imposed by Section 61-305, being the Section dealing with "double rent".

Counsel for the defendants (tenants) have committed themselves in open Court that the rent will be paid into the Registry of the Court until the aforesaid actions are

adjudicated and any tenant who fails to comply with this order, the action as related to that particular tenant, shall be dismissed upon appropriate motion and proper showing.

It is the ruling of this Court that Code Section 61-303 being codified from Act of the General Assembly of 1827, as amended, and Code Section 61-305, being codified from the Act of the General Assembly of 1827, as amended, are unconstitutional insofar as said Statutory provisions require tenant as a precondition to the defense of his case to tender a bond with good security, payable to the landlord for the payment of such sums, with costs, as may be recovered against him on the trial of the case; and insofar as said statutory provisions permit a landlord to recover from the tenant an amount equal to double the rent that may become due from date of the issuance of the warrant.

I do hereby certify in accordance with the procedure provided for under Georgia Laws 1968, p. 1073, being the appellate procedure Act of 1965, as amended; that the instant order and ruling of the Court is of such importance to the cases under consideration that immediate review should be had; and it is so ordered by this Court.

This the 2nd day of October, 1968.

/s/ Osgood O. Williams
Judge, Civil Court
of Fulton County

OPINION OF THE SUPREME COURT OF GEORGIA REVERSING THE ORDER OF THE CIVIL COURT OF FULTON COUNTY

SUPREME COURT OF GEORGIA

Decided Jan. 23, 1969

24992

STATE OF GEORGIA

v.

SANKS nee JONES ET AL.

24993

THE HOUSING AUTHORITY OF THE CITY OF ATLANTA ET AL.

v.

SANKS nee JONES ET AL.

Code §§ 61-303 and 61-305 do not violate the Fourteenth Amendment to the United States Constitution (Code § 1-815) nor the corresponding provisions of the Georgia Constitution (Code §§ 2-102, 2-103, 2-104, Art. 1, Sec. 1, Par. 2, 3, 4, Const. 1945).

UNDERCOFLER, Justice. This appeal is from the trial court's ruling that Code §§ 61-303 and 61-305 relating to dispossessory warrant proceedings are unconstitutional under the equal protection and due process clauses of the 14th Amendment to the U. S. Constitution (Code § 1-815) and corresponding provisions of the Georgia Constitution (Code §§ 2-102, 2-103, 2-104, Art. 1, Sec. 1, Par. 2, 3, 4, Const. 1945).

Code § 61-303 requires a tenant as a condition precedent to filing a defense to a dispossessory warrant to "tender a bond with good security, payable to the landlord, for the payment of such sum, with costs, as may be recovered against him on the trial of the case."

Code § 61-305 directs that if the issue shall be determined against the tenant, judgment shall go against him for double the rent.

1. "The Fourteenth Amendment to the Federal Constitution does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real and the condition imposed has reasonable relation to a legitimate object." 16 Am.Jur.2d 925, § 535; 16A CJS 507, § 559; Jones v. Union Guano Co., 264 US 171, 181 (44 SC 280, 68 LE 623). The rule is equally applicable to the filing of a defense.

In our opinion Code § 61-303 requiring a tenant filing a defense to a dispossessory warrant to post a bond to secure the landlord is not unreasonable. To the contrary, it is entirely appropriate and equitable to guarantee payment to the landlord while a tenant resists evidtion and has the use and benefit of the premises. The fact that a tenant in a particular case is indigent and unable to furnish a bond does not permit a different conclusion. Napier v. Varner, 149 Ga. 586(2) (101 SE 580); Reardon v. Bland, 206 Ga. 633, 639(3) (58 SE2d 377). "One of the principles on which this government was founded is that of equality of right, and this principle is emphasized in the equal protection clause of the Fourteenth Amendment. The Constitution of the United States is no respecter of the financial status of persons, and rich and poor are to be accorded equal rights under it . . ." 16 Am.Jur. 851, § 489.

"The due-process clause, and article 1, section 1, paragraph 4 (Code § 2-104) of the Constitution of 1945, providing that 'No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both,' do not guarantee to the citizen of the State any particular form or method of State procedure. Its requirements are satisfied if he has reasonable notice and opportunity to be heard, and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it." Zorn v. Walker, 206 Ga. 181(2) (56 SE2d 511).

"The proceeding to dispossess a tenant holding over is not instituted primarily for the purpose of collecting

rent. Its main purpose is to restore the landlord to the possession of the premises, and the imposition upon the tenant of a liability for double rent is an incident to the proceeding, and is in the nature of a penalty inflicted upon him for the wrong he has committed in refusing to deliver possession of the premises after demand is made upon him." Willis v. Harrell, 118 Ga. 906, 910(8) (45 SE 794); Hamilton v. McCroskey, 112 Ga. 651 (37 SE 859).

It is not unreasonable to allow appropriate damages as provided by Code § 61-305 against a tenant for unlawfully withholding possession of the landlord's premises. The summary dispossessory warrant proceeding is limited to failure to pay rent, holding over, or holding as a tenant at will or sufference, all of which facts should be within the knowledge of the tenant. The statutory damages provided by Code § 61-305 are reasonably calculated to compensate the landlord for having been unlawfully denied the use of his premises and to deter a tenant from asserting frivolous defenses to a rightful dispossession.

Except in extremely unusual circumstances, it is difficult for us to conceive that a landlord would attempt to oust a tenant who is complying with the terms of his lease. However, if this should occur, the tenant is not without remedy. He can sue for damages for wrongful eviction. Crusselle v. Pugh, 71 Ga. 744(2); Cannon v. Laing, 153 Ga. 88 (3, 4) (111 SE 565).

Furthermore, if the relationship of landlord and tenant does not exist and the occupant is unable to post bond because of his financial condition, an equitable remedy is available to him. Pope v. Thompson, 157 Ga. 391(1) (122 SE 604); Harvey v. Atlanta & Lowry National Bank, 164 Ga. 625(2) (139 SE 147); and Sims v. Etheridge, 169 Ga. 400(1) (150 SE 647).

Accordingly we cannot say that Code §§ 61-303 and 61-305 are unreasonable and therefore unconstitutional within the meaning of the Fourteenth Amendment to the United States Constitution and the comparable provisions of the Georgia Constitution.

2. For the reasons stated the trial court erred in holding that Ga. Code §§ 61-303 and 61-305 were unconstitutional, in allowing the tenants to file their counter-affidavits without first posting the bond required by Code § 61-303, and in holding that the tenants be permitted to assert their defenses without being subjected to the double rent provision of Code § 61-305.

Judgment reversed. All the Justices concur.

IN THE SUPREME COURT OF GEORGIA

24992

24993

The Honorable Supreme Court met pursuant to adjournment.

JUDGMENT—January 23, 1969

STATE OF GEORGIA

v.

LELIA MAE SANKS nee JONES ET AL.

This case came before this court upon an appeal from the Civil Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed for the reasons stated in the opinion this day filed. All the Justices concur.

BILL OF COSTS, $30.00

* * * *

IN THE SUPREME COURT OF GEORGIA

24992

24993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

STATE OF GEORGIA

v.

LELIA MAE SANKS nee JONES ET AL.

THE HOUSING AUTHORITY OF THE CITY OF ATLANTA ET AL.

v.

LELIA MAE SANKS nee JONES ET AL.

ORDER DENYING MOTION FOR REHEARING—
February 6, 1969

Upon consideration of the motion for a rehearing filed in these cases, it is ordered that it be hereby denied.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 1977 Misc., October Term, 1968

LELIA MAE SANKS, ET AL., APPELLANTS

v.

GEORGIA, ET AL.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—June 23, 1969

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

SUPREME COURT OF THE UNITED STATES

No. 1977 Misc., October Term, 1968

LELIA MAE SANKS, ET AL., APPELLANTS

v.

GEORGIA, ET AL.

ORDER NOTING PROBABLE JURISDICTION—June 23, 1969

APPEAL from the Supreme Court of the State of Georgia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the appellate docket as No. 1554, placed on the summary calendar and set for oral argument immediately following No. 1232.

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